

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KEIRTON USA INC.,

Plaintiff,

V.

UNITED STATES CUSTOMS AND
BORDER PROTECTION,

Defendant.

C21-224 TSZ

ORDER

THIS MATTER comes before the Court on a Motion for a Temporary Restraining Order, docket no. 8, brought by Plaintiff Keirton USA Inc. (“Keirton”). At a telephone status conference on March 3, 2021, the parties agreed to treat the motion as a motion for a preliminary injunction (“Motion”). Minute Entry (docket no. 16). The Court has reviewed all papers filed in support of, and in opposition to, the Motion and held oral argument on March 26, 2021. At oral argument, Keirton stated that it was seeking injunctive relief only for future shipments and not for the January 2021 shipment that Defendant United States Customs and Border Protection (“CBP”) excluded. At the conclusion of the hearing on March 26, 2021, the Court denied the Motion and deferred

1 the issue of the Court's subject matter jurisdiction. The Court now enters this Order
2 explaining its oral ruling and addressing the deferred issue of jurisdiction.

3 **Background**

4 Keirton manufactures and imports parts and components used for agricultural
5 purposes, as well as finished agricultural equipment, from British Columbia, Canada,
6 China, Taiwan, and Japan. Fluckiger Decl. at ¶ 3 (docket no. 12). Keirton's primary
7 finished product is the Twister Trimmer, a machine that separates branches from the
8 leaves and crop heads. Id. To the best of Keirton's knowledge, and pursuant to its
9 contractual agreements with buyers, its buyers use the Twister Trimmer for legal
10 purposes. Id. at ¶ 5.

11 In the fall of 2020, CBP seized a number of Keirton's shipments as illegal drug
12 paraphernalia.¹ Hickman Decl. at ¶ 4 (docket no. 21); Ex. A to Complaint (docket no. 1-
13 1 at 2). In response, Keirton filed a complaint in this District, seeking a temporary
14 restraining order ("TRO"). Keirton USA, Inc. v. U.S. Customs and Border Prot., Case
15 No. 20-1734-RSM, 2020 WL 6887871, at *1 (W.D. Wash. Nov. 24, 2020). The court in
16 that prior case denied Keirton's motion, concluding that Keirton had failed to
17 demonstrate a likelihood of irreparable harm in the absence of emergency relief. Id. at
18 *2. To support its motion for a TRO in that prior case, Keirton submitted declarations
19 from its President and CEO, Jay Evans, and its Director of Manufacturing, Jason

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21 ¹ CBP asserts that it began seizing Keirton's merchandise after seeing articles in which Keirton's
22 President and CEO discussed its merchandise in connection with cannabis. Hickman Decl. at ¶¶ 12–14
(docket no. 21).

1 Fluckiger. *Id.* The court concluded that the declarations, submitted by Keirton's own
 2 management, offered conclusory assertions and were thus insufficient, standing alone, to
 3 establish that Keirton would close without emergency relief. *Id.*

4 After the court denied Keirton's motion for a TRO in case number 20-1734-RSM,
 5 the parties reached a settlement agreement in which Keirton agreed to pay a remission fee
 6 in exchange for CBP releasing the seized merchandise ("2020 Settlement"). See Ex. A to
 7 Complaint (docket no. 1-1 at 3).

8 On January 19, 2021, CBP again detained one of Keirton's shipments containing
 9 \$34,936.24 worth of agricultural equipment. Hickman Decl. at ¶ 18; Ex. F to Hickman
 10 Decl. (docket no. 21-6). CBP requested additional information relating to the legality and
 11 admissibility of the detained equipment. Ex. G to Hickman Decl. (docket no. 21-7). In
 12 response to CBP's request to "[i]dentify and explain the intended end product," Keirton
 13 stated "[a]gricultural leaves separated from branches and stems." Ex. H to Hickman
 14 Decl. (docket no. 21-8). When asked to "[i]dentify and explain the materials the
 15 imported item will use to manufacture, produce, or process," Keirton responded
 16 "[a]gricultural crop branches and leaves." *Id.* Most of Keirton's responses to the other
 17 questions repeated variations of these answers. *Id.* Keirton also responded to questions
 18 by referring CBP to the Twister Trimmer User Manual. *Id.* Finding Keirton's responses
 19 to be "vague and unclear," CBP "was unable to make an admissibility determination."
 20 Hickman Decl. at ¶¶ 23–24.

21 Accordingly, on February 11, 2021, CBP notified Keirton that it was excluding the
 22 merchandise at issue pursuant to 19 U.S.C. § 1499(c)(5) and 19 C.F.R. §§ 151.16(f), (j).
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1 Ex. I to Hickman Decl. (docket no. 21-9). CBP also notified Keirton of its right to
2 protest the decision pursuant to 19 U.S.C. § 1514. Id. Keirton did not file a protest
3 pursuant to 19 U.S.C. § 1514(a); rather, it filed this Motion seeking prospective relief to
4 prevent CBP from excluding future shipments.

5 **Discussion**

6 **A. Subject Matter Jurisdiction**

7 CBP argues that the Court of International Trade (“CIT”) has exclusive
8 jurisdiction over this action. The Court agrees.

9 Congress may preclude district court jurisdiction by enacting an alternative
10 statutory scheme for administrative and judicial review. Axon Enter., Inc. v. Fed. Trade
11 Comm’n, 986 F.3d 1173, 1177–78 (9th Cir. 2021). Courts use a two-step inquiry to
12 determine whether Congress has impliedly precluded jurisdiction. Id. at 1178. “First, a
13 court asks ‘whether Congress’s intent to preclude district-court jurisdiction is fairly
14 discernable in the statutory scheme.’” Id. (quoting Bennett v. U.S. Sec. and Exch.
15 Comm’n, 844 F.3d 174, 181 (4th Cir. 2016)). “Second, a court considers ‘whether
16 plaintiffs’ claims are of the type Congress intended to be reviewed within this statutory
17 structure.’” Id.

18 **1. Congress’s Intent to Preclude District Court Jurisdiction**

19 To determine whether it is “fairly discernible” that Congress precluded district
20 court jurisdiction, courts examine the statutory text, structure, and purpose. See Elgin v.
21 Dep’t of Treasury, 567 U.S. 1, 10 (2012) (citing Thunder Basin Coal Co. v. Reich, 510

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1 U.S. 200, 207 (1994)). A “comprehensive review process” demonstrates an intent to
 2 preclude district court review. See Thunder Basin Coal Co., 510 U.S. at 208.

3 The Tariff Act of 1930 (“Act”) establishes a detailed structure for reviewing
 4 CBP’s decisions to exclude merchandise. Wirtgen Am., Inc. v. United States,
 5 443 F. Supp. 3d 198, 215 (D.D.C. 2020) (citing Thunder Basin Coal Co., 510 U.S. at
 6 207). Under the Act, an importer may file a protest with Custom Service within 180 days
 7 of CBP excluding a shipment from entry into the United States. 19 U.S.C. §§ 1514(a),
 8 (c)(3). Importers may also request an accelerated disposition, in which case a protest will
 9 be deemed denied if, after 30 days, Custom Service has not resolved the protest. Id.
 10 § 1515(b). If Custom Service denies a protest, the importer may file a civil action to
 11 contest that denial in the CIT. See id. § 1514(a). The CIT has exclusive jurisdiction over
 12 any civil action contesting the denial of a protest. 28 U.S.C. § 1581(a). An importer may
 13 appeal a final decision from the CIT to the Federal Circuit, which has exclusive
 14 jurisdiction over appeals from the CIT. Id. § 1295(a)(5). Courts have found such
 15 “exclusive” grants of jurisdiction to preclude district court jurisdiction over claims
 16 relating to the relevant statutory scheme. See, e.g., Thunder Basin Coal Co., 510 U.S. at
 17 208; Jarkesy v. S.E.C., 803 F.3d 9, 16 (D.C. Cir. 2015); Wirtgen Am., Inc.,
 18 443 F. Supp. 3d at 211.

19 The detailed structure of the Act demonstrates Congress’s intent to preclude this
 20 challenge. See Thunder Basin Coal Co., 510 U.S. at 207–09. Nothing in the text of the
 21 Act suggests that an importer may avoid its review structure by declining to file a protest

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1 and instead filing a district court action challenging future enforcement proceedings.²

2 The Court concludes that the Act reflects a fairly discernible intent to preclude district
3 court jurisdiction over CBP's exclusion decisions.

4 **2. Claim Is of Type to Be Reviewed within the Statutory Scheme**

5 When inquiring whether a party's claims are of the type Congress intended to be
6 reviewed within the statutory structure, courts "must consider: (1) whether the plaintiff
7 can obtain meaningful judicial review in the statutory scheme, (2) whether the claim is
8 'wholly collateral' to the statutory scheme, and (3) whether the claim is outside the
9 agency's expertise." Axon Enter., Inc., 986 F.3d at 1181 (citing Elgin, 567 U.S. at 15).

10 These factors are "general guideposts useful for channeling the inquiry into whether the
11 particular claims at issue fall outside an overarching congressional design." Id. (quoting
12 Jarkesy, 803 F.3d at 17). Further, the presence of meaningful judicial review is sufficient
13 to decide that Congress precluded district court jurisdiction over a type of claim. Id.

14 In considering these factors, Keirton's claim regarding possible future action by
15 CBP is of the type over which Congress precluded district court jurisdiction. First,
16 Keirton fails to argue that it could not obtain meaningful judicial review in the CIT.
17 Indeed, the CIT could grant Keirton's claim for injunctive relief. USCIT R. 65;
18 28 U.S.C. § 2643(c)(1). For example, in One World Technologies, Inc. v. United States,
19 380 F. Supp. 3d 1300 (Ct. Int'l Trade 2019), an importer sought an injunction from the

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21 ² Here, Keirton seeks an order finding that its merchandise is not drug paraphernalia and requiring "CBP
22 to cease and desist from future detentions and rejections of the Merchandise/the Twister Trimmer
components." See Keirton's Proposed Order (docket no. 8-1).

1 CIT to allow future imports of its merchandise into the United States after CBP excluded
2 four of its shipments. Id. at 1308. The CIT considered the preliminary injunction under
3 the same four factors used by this Court, see Section B infra, and granted the preliminary
4 injunction. Id. at 1321–24. As One World Technologies demonstrates, Keirton would
5 not be precluded from all meaningful judicial review if this Court lacks jurisdiction over
6 its claims. This factor favors jurisdiction preclusion.

7 Turning to the second factor, a claim is “wholly collateral” if a party does not raise
8 it in response to an administrative proceeding. Axon Enter., Inc., 986 F.3d at 1185. If,
9 however, the claim is the procedural vehicle by which the party is using to reverse the
10 agency action, then the party must seek relief through the statutory scheme. Id. at 1185–
11 86. Here, Keirton’s claim for injunctive relief is raised in response to CBP’s exclusion
12 decision and is the vehicle by which it seeks to prevent CBP from excluding future
13 shipments. This constitutes a challenge to CBP’s decision to exclude its merchandise,
14 which is precisely the type of action regularly adjudicated by the CIT and the Federal
15 Circuit within the statutory scheme. See Elgin, 567 U.S. at 22.

16 At least one district court has considered jurisdictional preclusion under similar
17 circumstances. In Wirtgen America, CBP excluded several machines from entry into the
18 United States, determining the machines fell within a Limited Exclusion Order (“LEO”).
19 443 F. Supp. 3d at 203. The importer, Wirtgen, then filed a motion for a preliminary
20 injunction in the D.C. district court and sought to prevent CBP from applying the LEO to
21 future shipments of its machines and to require CBP to permit entry of its future
22 shipments into the United States. Id. The district court held that it lacked jurisdiction

1 over the Wirtgen's claims because it was clear that Congress had intended the Tariff
 2 Act's alternative statutory scheme to "be the exclusive forum for challenging exclusion
 3 decisions by [CBP]." Id. at 214. The court rejected Wirtgen's argument that district
 4 court jurisdiction was appropriate because it sought prospective, as opposed to
 5 retrospective relief. Id. at 217. The court reasoned that "[e]ven assuming that Wirtgen
 6 would have standing to seek prospective relief separate from [CBP's] exclusion of its
 7 particular machines, Wirtgen ha[d] not shown that its claims . . . fall outside the scope of
 8 [the] special statutory scheme." Id. (citation omitted).³

9 Similarly, Keirton has failed to show that its request for prospective relief falls
 10 outside of the Act's comprehensive review structure. Instead, Keirton's claims are the
 11 procedural vehicle it is using to challenge CBP's exclusion decision. Accordingly,
 12 Keirton's claims are not wholly collateral to the statutory scheme.

13 Finally, a claim is within an agency's expertise when it involves "technical
 14 considerations of [agency] policy." Axon Enter., Inc., 986 F.3d at 1186 (quoting Free
 15 Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 491 (2010)). Given that

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 18 ³ Although Wirtgen America is distinguishable because the importer, Wirtgen, filed a protest with the
 19 CIT, it is noteworthy because the district court held that the CIT had exclusive jurisdiction to consider
 20 exclusion decisions. In that case, at the time Wirtgen moved for a TRO and preliminary injunction before
 21 the D.C. district court, it had a claim pending before the CIT to review Custom Service's denial of its
 22 protest pursuant to 19 U.S.C. § 1514(a). See 443 F. Supp. 3d at 203. While the case was on appeal, the
 23 CIT determined that CBP improperly excluded Wirtgen's machines. Wirtgen Am. Inc. v. United States,
 447 F. Supp. 3d 1359, 1370–71 (Ct. Int'l Trade 2020). As a result, the D.C. Circuit dismissed Wirtgen's
 appeal as moot because Wirtgen had received all the relief it had requested in its complaint. Wirtgen
Am., Inc. v. United States, No. 20-5064, 2021 WL 1158195, at *1 (D.C. Cir. Jan. 12, 2021). The D.C.
 Circuit remanded the case to the district court with instructions to consider vacatur of its prior order in
 light of the mootness issue. Id.

1 Keirton is challenging the merits of whether CBP may exclude its future shipments from
 2 entry into the United States, the CIT's experience in interpreting exclusion orders can be
 3 brought to bear on Keirton's claims. See Wirtgen Am., Inc., 443 F. Supp. 3d at 218. The
 4 Court concludes that it lacks subject matter jurisdiction over Keirton's claims and
 5 dismisses the Complaint.

6 **3. Adequate Remedy**

7 Keirton cites Jerlian Watch Company v. U.S. Department of Commerce, 597 F.2d
 8 687 (9th Cir. 1979) to argue that even if the CIT has jurisdiction, this Court also has
 9 jurisdiction under the "no adequate remedy" exception. CBP disputes the validity of this
 10 exception. Even assuming Jerlian Watch created an exception, Keirton fails to meet that
 11 exception. Keirton contends that the CIT does not provide an adequate remedy because it
 12 will go out of business without injunctive relief. Motion (docket no. 8 at 3 n.2). In
 13 Jerlian Watch, however, the Ninth Circuit rejected the argument that financial hardship
 14 could create an exception to otherwise exclusive jurisdiction. 597 F.2d at 692
 15 ("[F]inancial hardship is irrelevant to a determination of whether an adequate remedy
 16 exists."). Instead, "[t]he dispositive consideration in determining whether plaintiffs have
 17 an adequate remedy is the nature of the barrier and not its financial height." Id. Thus,
 18 because Keirton can raise its claim for injunctive relief in the CIT, it fails to meet the
 19 exception.⁴

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21 ⁴ After the Court held oral argument, Keirton submitted a declaration stating that if this Court determined
 22 it lacked jurisdiction, "CBP will almost certainly assert the [CIT] is not the proper forum for Keirton's
 23 claim either." Thoreson Supp. Decl. (docket no. 26 at ¶ 2). Keirton attached exhibits relating to another

1 **B. Preliminary Injunction**

2 Even if the Court has jurisdiction, the Court would nevertheless deny the Motion
 3 because Keirton has failed to demonstrate that it would suffer irreparable harm in the
 4 absence of injunctive relief.

5 Preliminary injunctive relief, is an extraordinary remedy, “never awarded as of
 6 right.” Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24 (2008). A party seeking
 7 a preliminary injunction must establish (1) a likelihood of success on the merits; (2) a
 8 likelihood of irreparable harm in the absence of preliminary relief; (3) a balancing of
 9 equities tips in favor of a preliminary injunction; and (4) an injunction is in the public
 10 interest. Id. at 20; see Stuhlbarg Int’l Sales Co., Inc. v. John D. Brush & Co., Inc., 240
 11 F.3d 832, 839 n.7 (9th Cir. 2001) (the standards for a TRO and a preliminary injunction
 12 are equivalent).

13 The Court concludes that Keirton would not be entitled to a preliminary injunction
 14 because it fails to establish a likelihood of irreparable harm. Although courts do not
 15 typically consider monetary injuries as irreparable, “[t]he threat of being driven out of
 16 business is sufficient to establish irreparable harm.” hiQ Labs, Inc. v. LinkedIn Corp.,
 17 938 F.3d 985, 993 (9th Cir. 2019) (quoting Am. Passage Media Corp v. Cass Commc’ns,
 18 Inc., 750 F.2d 1470, 1474 (9th Cir. 1985)).

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 20 case, Root Scis., LLC v. United States, in which CBP argued that the CIT lacks jurisdiction. Exs. A & B
 21 to Thoreson Supp. Decl. (docket no. 26-1). As CBP states in its response, however, in Root Sciences,
 22 CBP argued that the CIT lacks jurisdiction over a wrongful seizure claim. Supp. Response (docket no. 27
 at 1–3). District courts have original jurisdiction over seizures. 28 U.S.C. § 1336. Thus, Keirton’s
 reliance on Root Sciences fails.

1 Keirton points to the declarations of its President and CEO, Jay Evans, to argue
 2 that Keirton will go out of business if it does not obtain injunctive relief. The statements
 3 in Evans's declarations, however, are conclusory. See Evans Decl. (docket no. 11 at ¶
 4 14) ("Unless the imminent shipments are permitted entry into the United State[s] in the
 5 next two weeks, Keirton will be forced to shut down its assembly operations . . .").⁵
 6 The declaration submitted by Keirton's Director of Manufacturing, Jay Fluckiger, is
 7 similarly conclusory. Fluckiger Decl. (docket no. 12 at ¶ 11) ("Without the ability to
 8 import Goods, Keirton will soon have to lay off all of its employees and close the
 9 business permanently."). These declarations do not provide the basis for their
 10 conclusions and they are insufficient to establish that Keirton will suffer irreparable
 11 harm. See Am. Passage Media Corp, 750 F.2d at 1474 (conclusory statements from a
 12 company's president, standing alone, did not establish irreparable harm); cf. hiQ Labs,
 13 Inc., 938 F.3d at 993 (finding irreparable harm where company showed likelihood of
 14 having to breach existing contracts with specific clients, that its financing round had been
 15 stalled, and that several employees had left the company). The declaration submitted by
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18 ⁵ Evans initially submitted a declaration that contained statements very similar to the ones that Judge
 Martinez rejected as too conclusory in November 2020. Compare Evans Decl. (docket no. 11) with
 19 Evans Decl. (docket no. 12) (Case No. 20-1734-RSM). Evans has now submitted a supplementary
 declaration, but this declaration is again conclusory. See Evans Supp. Decl. (docket no. 18). In his
 20 supplemental declaration, Evans states that Keirton will not be able to honor existing contracts with
 customers in the United States and that he believes customers will therefore turn to a competitor. Id. at
 21 ¶ 4. Evans, however, does not specify which contracts Keirton will not be able to honor and does not
 provide any declarations from Keirton's customers to support his statement that they will turn to a
 22 competitor. See Am. Passage Media Corp, 750 F.2d at 1473 (insufficient evidence of irreparable harm
 where none of company's customers stated it would discontinue business with the company and where
 the company did not show that the contracts with the customers threatened the company's existence).

1 Larry Wood, docket no. 24, a CPA and CFP hired by Keirton, mostly repeats what is
2 already in the record and lacks specific details like, for example, what contracts Keirton
3 would breach and the importance of those contracts to the company's existence. See Am.
4 Passage Media Corp, 750 F.2d at 1473.

5 The Court determines that, even assuming the Court has jurisdiction, Keirton
6 cannot demonstrate irreparable harm, and its claim for a preliminary injunction fails on
7 its merits.

8 **Conclusion**

9 For the foregoing reasons, the Court ORDERS:

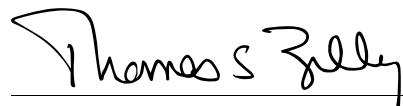
10 (1) As stated in the hearing on March 26, 2021, the Court DENIES the Motion,
11 docket no. 8, because Keirton has not established irreparable harm.

12 (2) After now considering the jurisdictional issue, the Court now DISMISSES
13 the Complaint, docket no. 1, for lack of jurisdiction.

14 (3) The Clerk is directed to send a copy of this Order to all counsel of record
15 and to CLOSE the case.

16 IT IS SO ORDERED.

17 Dated this 16th day of April, 2021.

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21 Thomas S. Zilly
22 United States District Judge
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